No. 14618

In the United States Court of Appeals for the Ninth Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

BEKINS VAN & STORAGE COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

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CITATIONS

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No. 14,618

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REPLY BRIEF FOR APPELLANT

Appellee's brief goes beyond the single issue presented for decision in this case. It reflects, moreover, a misunderstanding of the opposing positions taken in *Phillips* (324 U. S. 490) and the Supreme Court's holding in that case, as well as a misconception of the plain terms and legislative history of the statutory provision here involved. For these reasons, this reply brief is deemed necessary.

1. The issue in this case is still the narrow question whether appellee's Alameda warehouse is a separate

"establishment" within the meaning of Section 13(a)(2) of the Fair Labor Standards Act. Appellee's assertions that "* * * whether the warehousing service is to commercial users or non-commercial users is irrelevant" (br. p. 24) and that "Not one of the references in the amended section would apply to the Alameda warehouse" (br. p. 19), are plain misstatements of the case before this Court for decision and serve only to confuse. Apparently appellee is ignoring the plain import of the stipulations and findings in the court below.

Appellee stipulated:

> It is agreed and the Court may accept as established fact without further proof that the percentage tests of Section 13(a)(2) of the Fair Labor Standards Act of 1938, as amended, are satisfied if the East Los Angeles Division is a single "establishment" within the meaning of Section 13(a)(2), the business activities of which are considered together as a unit, but that such tests are not met in the case of Alameda if Alameda alone is a single "establishment" within the meaning of Section 13(a)(2), the business activities of which are considered separately as a unit. (Stip. XII, R. 18)

Appellee's counsel also admitted in open court that Alameda did not meet the tests prescribed by the statute (R. 107-8). On the basis of this stipulation and appellee's admission in open court, the trial court found "Such tests [Section 13(a)(2)] are not met in the case of the Alameda warehouse considered separately" (Fdg. 2, R. 34). This, we submit, forecloses argument on that issue and appellee cannot now be heard to say

that Alameda's status under the tests prescribed in Section 13(a)(2) is unascertainable.

2. Appellee has completely misconceived the opposing positions taken in *Phillips,* as well as the Supreme Court's holding in that case. We contended there, just as we contend here, that "each distinct physical unit of petitioner's [appellee's] organization is a separate establishment" (Govt.'s br., p. 12). Our position was based on the meaning of the term "establishment" as Congress used it in Section 13(a)(2) of the Act, as it is normally understood, and as it had been used in government and business prior to the Act's passage.

The legislative history on which we relied is summarized in the *Phillips* decision and need not be repeated here. See 324 U. S. 497, n. 7. The decision also summarizes what we had to say about the use of "establishment" in government and business. See 324 U. S. 496, n. 6. As to the normal meaning of the term, we pointed out that it "connotes 'a place of business or a building or location where business is conducted' "; and that "While there are looser senses in which the term may sometimes be used, its primary commercial and mercantile connotation is one of *locus,* not of enterprise or organization," citing Webster's New International Dictionary (2d ed., 1934); 16 Cyc. 593; 30 C. J. S., p. 1234; Black's Law Dictionary (3d ed.) (Govt.'s br., p. 6, 10-11).

In no part of our written or oral argument of the case did we rely on Phillips' organizational structure to support our position. On the contrary, the net effect of our argument was that organizational structure was immaterial. And this was the net effect of the Supreme Court's holding, as is plainly indicated in its recognition

of the organizational integration of the separate units of Phillips' enterprise.

Phillips, on the other hand, contended that the operations of its central office and warehouse were so closely integrated with those of its stores that all of them together constituted a single "retail establishment." Contrary to appellee's assumption (br., p. 34), Phillips relied on its central management, administrative organization and record-keeping practices in an effort to support its contention. Thus, in its Supreme Court brief (p. 2), it pointed out that its 49 retail stores were "all within a radius of thirty-five miles of Springfield"; and its warehouse, located in Springfield, "serves all of these stores;" and that the "business office of the company, * * * likewise located in Springfield, * * * performs all of the usual office work in connection with the entire business, except such sales records as originate in the stores themselves before transmittal to the office".[1] Indeed, like appellee here, it argued that "the sales outlets, the warehouses and office are as much an establishment as if all these activities were confined in one building" (Phillips' Supreme Court br., p. 12); and

[1] Phillips' summary of how it operated was fully supported by the record, which showed that all merchandise for the stores, except bread, milk, and pastry, passed through the warehouse; that the central office kept the inventory records for each store and recorded transfers of goods from one store to another; that all the stores were serviced by a single fleet of trucks operating out of the warehouse; that the stores were divided into three groups and each group was supervised by a superintendent working out of the central office; that the superintendents not only revised requisitions for goods prepared by the store managers but even collected their daily cash receipts and deposited them in the company's bank account; that the work of checking invoices, deliveries and store credits, paying bills, and preparing payrolls for all employees (warehouse, office, and stores) was all done in the central office. See the findings of the trial court, 50 F. Supp. 749-752.

that "Whether or not an establishment, great or small, is a 'retail establishment' depends, *not on the physical location of its units,* but on the character of its business" (*Id.,* p. 11; emphasis added).

As the decision plainly shows, the Supreme Court rejected Phillips' argument and accepted the Government's instead. In so doing, the Court recognized that the functions of the central office and warehouse were "completely meshed" with those of the stores (324 U. S. 494-495). The functions were "integrated", said the Court, but "*physically* distinct" (*Id.,* at 495; emphasis added); and this fact was specifically held to be the "essential key to the problem" (*Id.,* at 496). Therefore, although the "prime function of petitioner's chain store system [was] to sell groceries at retail", and although the warehouse and central office were "vital factors in this integration of the retail and wholesale functions," the Court nevertheless held that the Phillips' enterprise was composed "of 49 retail establishments and a single wholesale establishment" (*Id.,* at 494, 496).

It is, therefore, difficult to fathom appellee's argument that the word "physical" in the Supreme Court's definition of establishment, "as meaning a distinct physical place of business," is merely dictum.

3. Appellee's contention that the 1949 amendment to Section 13(a)(2) and its legislative history support the conclusion that Alameda is not a "separate establishment", results from a distorted and illogical interpretation of both the amendment and its legislative history. The amendment in no way effected a change in the definition of "establishment" as laid down by the Supreme Court in *Phillips* v. *Walling,* 324 U. S. 490. As

pointed out in our main brief (pp. 22-24), Congress expressly adopted the Supreme Court's definition.

It is unmistakably clear from the legislative history of the 1949 amendment that Congress did not intend to change or expand the basic scope of the Section 13(a)(2) exemption.[2] The sponsors[3] of the amended language repeatedly and emphatically disavowed any intent to change or expand the basic scope of the exemption. Senator Holland, the sponsor of this amendment, described it as simply "a clarification" of a relatively minor aspect of the exemption—to prevent a sale from being classified as nonretail merely because it was for business rather than for personal consumer use. Pointing out that the Supreme Court's decisions had "cast considerable doubt upon the application of the exemption to any retail or service establishment * * *, making some sales to business users," Senator Holland explained the limited purpose of the amendment as follows:

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[2] The complete congressional debates and reports on the 1949 amendment to Section 13(a)(2) are too extensive for inclusion in this reply brief. For a more complete discussion see: 95 Cong. Rec. 11115-11116; 12490-12503; Report of Senate Conferee's, 14877; Statement of Senator Taft, 14880; Statement of House Managers, 14931-14932. See also Interpretive Bulletin, "Retail and Service Establishment and Related Exemptions", 29 CFR (1955 Supp.) 779; 15 F.R. 7245.

As to appellee's statement that *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, was "specifically overruled" (br. p. 25), see Senator Holland's statement that the answer to that question was *"Definitely not"* (95 Cong. Rec. 12505, emphasis added), and Representative Lesinski's statement that "* * * the reference to [*Roland, supra*] *should not mislead anyone into concluding that the conferees intended to reverse or nullify that decision* (95 Cong. Rec. 14942; emphasis added).

[3] "It is the sponsors that we must look to when the meaning of the statutory words is in doubt." See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395.

> The amendment clears up that doubt by exempting the establishments which are traditionally regarded as retail. It is *only in the sense that it clarifies such doubt that the amendment can be regarded as expanding the present exemption. But in a real sense it is not expanding the exemption at all* but simply confirming it for those establishments which the Congress always intended to exempt [95 Cong. Rec. 12506; emphasis added].

The identical explanation was made by Representative Lucas, sponsoring the amendment in the House of Representatives, 95 Cong. Rec. 11115-11116 (1949). The House Managers' Report, as appellee recognizes (br. p. 25), confirms this limited purpose of the amendment.

> This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co.* v. *Walling* (326 U. S. 676); *McComb* v. *Diebert* (E. D. Pa. 1949), 16 Labor Cases Par. 64, 982; *McComb* v. *Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948)) [95 Cong. Rec. 14931 (1949)].

It is thus plain that the sole purpose of the amendment was to make it clear that establishments traditionally regarded as retail would be exempt even though some of their sales or services might be nonretail in nature. This was done by prescribing percentage tests. Admittedly, those tests are not met in the case of Alameda.

Section 13(a)(2), by its clear and unequivocal terms, contemplates the following procedure in ascertaining

the applicability of the exemption. First, determination of the "establishment" for which the exemption is sought (the issue here), and second, application of the prescribed tests to the sales of the "establishment" as thus determined.

Appellee contends that the amendment makes the accounting practices and business organization of a company determinative of what is an "establishment." It argues that the amendment "requires an analysis of the *company's* business organization and practices" and that "consideration must be given to the operational, financial and accounting organization of the *business*" (Br. p. 35; emphasis added). It will be noted that nowhere in Section 13(a)(2) are the terms "company" or "business" used. The section speaks solely in terms of "establishment," and the tests are stated in clear objective terms. In sum, what appellee argues, despite protestations to the contrary, is that an enterprise may determine for itself by its administrative practices what constitutes an "establishment", and then the tests are to be applied to whatever segment of the enterprise (here five warehouses and a central office) the company wishes to label as an "establishment".[4] This clearly is contrary to the terms of the exemption and its expressed legislative intent. The administrative organization of a company is in no wise determinative of the "establishment" issue. That issue must be independently resolved in accordance with the criteria laid down

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[4] Appellee has chosen to label its multi-unit East Los Angeles Division as the basic unit, i.e., "establishment," and appears to infer that this division has been in effect for half a century. The record shows that until 1938 all the warehouses in metropolitan Los Angeles were operated without divisional distinctions. At that time the city was divided into two areas and the East Los Angeles Division came into existence (R. 66).

in *Phillips* and the cases decided thereunder, which appellee concedes were correctly decided.

4. Appellee's reliance on *Tobin* v. *Aibel,* 112 F. Supp. 156, affirmed *per curiam,* 204 F. 2d 376 (C. A. 2), is plainly misplaced. The issue there was not the meaning of "establishment" in the context in which it is used in the Section 13(a)(2) exemption from the Act, but in a completely different context under an administrative regulation designed to protect the Act's standards by prohibiting the exploitation of homeworkers in the Knitted Outerwear Industry. The regulation broadly defined the Knitted Outerwear Industry for the very purpose of including all operations in it, regardless of the division of parts of the industry among particular employers. Thus, it covered not only "knitting" but the "further manufacturing, dyeing or other "finishing" of articles of knitted outerwear which are "partially or completely manufactured in the same establishment as that where the knitting process is performed" (29 C.F.R. 617).

The defendants in the case (a man and his wife) were engaged in the production of hairnets which are made from a knitted fabric. They sought to avoid the regulation by dividing the work between two legal entities (a corporation and a partnership) and by designating a physically separate location for the distribution and collection of the homework. The issue in *Aibel* was whether the court would disregard the corporate entity and treat the family corporation and the family partnership as a single establishment for purposes of the regulation. In other words, would the court permit the defendants to evade the Administrator's regulation by the simple device of arbitrarily dividing the operations between two formal legal entities, both of which they op-

erated and controlled, and designating as an establishment a physically separate place for the distribution and collection of the homework. The decision to disregard the physical separation of the distribution point was thus no more than a refusal to permit evasion of the plain purpose of the regulation. That decision clearly has no relevance in determining the meaning of "establishment" as used in a wholly different context in the Section 13(a)(2) exemption. Even words in the statute itself do not mean the same thing each time they appear. See *Farmers Reservoir and Irrigation Co.* v. *McComb,* 337 U.S. 755, where the Supreme Court specifically refused to give the word "produced" in the agriculture *exemption* the same broad meaning which it has for *coverage* purposes in Section 3(j).

5. The interpretation of the term "establishment" under the various state unemployment compensation statutes does not provide, as appellee contends, persuasive authority for its position. Even if it be assumed that the broad interpretation of the term "establishment" was warranted in the cases cited by appellee, the policy of the unemployment compensation statutes involved in those cases and the context of the word "establishment" in those statutes are quite different from the statutory policy and context of the term here. In the *Phillips* case, petitioner relied on both *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87, and *Spielmann* v. *Industrial Comm.,* 236 Wisc. 240, 295 N. W. 1, cited by appellee here, in the Circuit Court and in the Supreme Court, as did the American Retail Federation, *amicus curiae* in the Supreme Court.[5] The Supreme

[5] See Briefs for A. H. Phillips, Inc., Circuit Court Br. pp. 4-5; Supreme Court Br. pp. 7-8; American Retail Federation Br. p. 18.

Court rejected the interpretation of "establishment" in those decisions and approved the Government's that the term means "a distinct physical place of business."

The Supreme Court, moreover, has repeatedly cautioned against interpreting this Act in accordance with principles laid down in cases arising under other Federal statutes which, though "similar", are not "strictly analogous." *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131. This has been the Court's view from one of its earliest decisions under the Act (*Kirschbaum Co.* v. *Walling*, 316 U.S. 517) to its latest (*Mitchell* v. *C. W. Vollmer & Co., Inc.*, decided June 6, 1955, 75 S. Ct. 860. If cases arising under "similar" Federal statutes are not pertinent, it cannot be gainsaid that cases arising under dissimilar State statutes are clearly inapposite.

6. Appellee's reference to the "powerful" Teamsters Union is obviously for the purpose of coloring the case. The Act's overtime provisions apply to union and non-union employees alike. And as appellee itself recognizes, union contracts cannot take precedence over the statutory requirement of time and one-half compensation for hours worked in excess of 40 a week (br., p. 38).

7. We pointed out in our main brief, pp. 22-23, that the Government's interpretation of "establishment" was outstanding in 1949 when Congress not only approved it by approving Phillips, but provided in Section 16(c) of the Fair Labor Standards Amendments that all administrative interpretations in effect and not inconsistent with the Amendments "shall remain in effect." We now wish to call attention to the fact that the Supreme Court has recently relied upon Section 16(c) to uphold two prior administrative interpreta-

tions of the Act. See *Maneja* v. *Waialua Agricultural Co.,* decided on May 23, 1955, 75 S. Ct. 719, 728; *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, 16-17. The interpretations in both of the cited cases, though outstanding in 1949, were "new" in that they represented a change in position. Here, however, it has been the consistent administrative position ever since the Act's passage that "establishment" means a "distinct physical place of business." The *Alstate* and *Waialua* rulings, therefore, *a fortiori* apply here.

Respectfully submitted,

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